**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 544 OF 2005**

Abhijit Ramesh Pradhan ...Petitioner

Versus

Mrs. Leena Abhijit Pradhan ...Respondent

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Mr. G.S. Godbole, counsel for Petitioner

Mr. N.D. Jaywant, counsel for Respondent.

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**CORAM: B. H. MARLAPALLE, J.**

**DATED: 1ST MARCH, 2005**

**P. C.:-**

1. Heard Mr. Godbole, the learned counsel for the petitoner-husband and Mr. Jaywant. the learned counsel for the respondent-wife.

2. Rule. The respondent waives service and rule is taken up for hearing forthwith by consent of the parties.

3. The parties were married according to Hindu Vedic Rites and customs on 21.5.1994 at Thane and from the wedlock, a daughter by name Rhea was born on 10.12.1996. Sometimes in 1998, the family went to United State of America and they returned in May, 1999, however, in August, 1999 the respondent alone

went to U.S.A. on student Visa. She continued her academic interest and the husband approached the Family Court at Pune with a petition for divorce. Both the parties have decided to separate and the consent decree for divorce came to be passed on 24.8.2002. It was agreed between the parties that the daughter Rhea would remain in the custody of her father and would join her mother only after she completes her Ph.D. Degree which was expected to be obtained by September, 2002. The petitioner husband married second time. The respondent-wife could not return India by September, 2002 and the petitioner-husband filed an application for permanent custody of Rhea under Section 26 of the Hindu Marriage Act, 1955 which came to be registered as P.A. No.691 of 2003 and also filed Darkhast No. 18/2004. The application registered as P.A. No.691 of 2003 came to be withdrawn unconditionally and Darkhast No.18 of 2004 was dismissed by the Family Court as being pre-mature. The petitioner-husband filed fresh petition for custody of the minor daughter U/sec. 26 of the Hindu Marriage Act, 1955 and it was registered as P.A. No.237 of 2004. The parties adduced their evidence. The husband examined himself 10 other witnesses, whereas on behalf of the wife, the father and Power of Attorney stepped into the witness box. In addition to the father, some more witnesses were examined on behalf of the

respondent-wife. At this stage, the wife filed an application at Exh.61 seeking permission to record evidence by Video Conferencing. This was for her own evidence as well as for other 8 to 10 witneses. This application was also opposed by the petitioner-husband and in addition he also pressed for examining few other witnesses of his side by Video Conferencing. By an order dated 25.11.2004, the learned Judge of the Family Court was pleased to allow the prayer made by the respondent-wife and the husband's counter prayer was rejected and hence, this petition.

4. The Family Court proceeded on the basis that the petitioner-husband had technically no objection for recording the evidence by Video Conferencing and the application was objected on merits on two grounds viz. the father of the respondent-wife was already examined and therefore, the respondent-wife could not be allowed to step into the witness box lest this again amounted to record the evidence of some witneses of the same party which is not permissible in law. The second objection was regarding the prejudice which was likely to be caused by giving list of witnesses at the very belated stage. The Family Court noted that the father of the respondent-wife had never visited the U.S.A. and he was therefore, ignorant of the family, social and

economical conditions in which the minor child would be required to stay if the custody was granted to the wife and, therefore, he could not be treated to be a substitute witness of the wife. On the second time, the Family Court noted that the petitioner-husband had examined 10 witnesses and the respondent-wife had examined four witnesses, a decree for divorce by mutual consent was already passed. Only the issue that remained was regarding the permanent custody of the daughter. The learned Judge was of the opinion that the wife should be given fair opportunity to lead her evidence and the evidence of her witnesses to show the well being of the minor child, if put in the custody, would not be adversely affected in the U.S.A. The issues were framed on 25.8.2004 at Exh.14 but the petitioner-husband himself had filed a list of witnesses, thereafter i.e. on 23.9.2004 at Exh.31. When the husband himself did not follow the provisions of Order XVI Rule 1 of C.P.C. and his challenge the the failure on the same issue by the wife could not be taken into consideration and, therefore, the learned Judge proceeded to allow the application of the wife and rejected the request made by the petitioner-husband. But at the same time, the Court Commissioners representing either sides have also been appointed.

5. The learned counsel for respective parties have

advanced their arguments and they do not dispute that the prime consideration of the court should be the welfare of the minor child while deciding the issue of granting custody to either of the parents. It was pointed out by the petitioner that his second wife i.e. Dr. Rashmi Patil, though a Medical Practitioner, has virtually stopped her practice to devote her full time for the family and more particularly for the upbringing of the minor daughter, and therefore, the daughter does not miss the love, care and nursing of the mother. While supporting the order passed by the Family Court, the learned counsel for the respondent-wife has pointed out that by merely recording the evidence of additional witnesses, no prejudice is likely to be caused to the petitioner's case and rights of the respective parties to have the custody of the minor daughter will have to be decided as per the law after considering the surroundings factors like members in the family, care, love and affection that would be available to the daughter and other relevant considerations.

6. It is true that the evidence of respondent-wife's father would not be treated to be a substitute for her evidence, more so when he is totally ignorant about the conditions in which she lives and therefore, the order allowing to record the evidence

of the wife by way of Video Conferencing cannot be faulted with. Mr. Godbole, the learned counsel for the petitioner husband referred to the decision of the Supreme Court in the Case of **State of Maharashtra Vs. Dr. Praful B. Desai, AIR 2003 SC 2053** and more particularly the observations made in paragraph No.19 and submitted that the order allowing recording of evidence by Video Conferencing could not have been passed. The learned Judge of the Family Court has considered the objections raised and passed the order. However, allowing the wife to examine another eight witnesses does not stand to justification. It is also required to be noted that pursuant to the order passed by this Court, the execution proceedings are made time bound and therefore, the wife's interest would be best served by allowing her to examine two more witnesses in addition to herself. The directions to propose the names of practicing advocates for appointment of Court Commissioner have already been implemented and both the parties have submitted the names. There is no reason to disturb that order.

7. In the case of **Kumar V. Jahgirdar Vs. Chethana Ramatheertha [(2004) 2 SCC 688]**, similar situation was considered and the Apex Court has laid down certain parameters while deciding the issue of custody of a minor child to one of the natural

parents on separation and subsequent re-marriage. There could be no doubt that the Family Court would be guided by the same decision. Needless to mention, it would be imperative for the Family Court to interview Dr. Rashmi Patil so as to assess the family atmosphere in the house of the petitioner, in case she is not one of the witnesses already examined by the petitioner-husband. At the same time, if need be, the learned Judge of the Family Court may also interview the minor daughter who is about more than 8 years old now so as to assess the future well being of the minor and her desire, while deciding the issue regarding her custody to be granted to either of the parents.

8. In the result, the writ petition is partly allowed and the impugned order is modified as follows:-

a. The evidence of respondent wife and two of her witnesses will be recorded by Video Conferencing;

b. The appointment of Court Commissioners is approved;

c. Dr. Rashmi Patil would be interviewed by

the learned Judge of the Family Court, if she has not been examined as one of the witnesses on behalf of the petitioner-husband and this interview will be in camera;

e. If so desired, the learned Judge of the Family Court may also interview in camera the minor child i.e. Rhea.

f. The time schedule as originally set out shall be maintained.

9. Writ to go forthwith to the court below.